

***NATIONAL MARINE FISHERIES SERVICE POLICY DIRECTIVE PD 31-107
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Financial Management and Budget

***FUNDING THE GRANT AND NATIONAL FISHERIES RESEARCH AND
DEVELOPMENT PROGRAM UNDER THE SALTONSTALL-KENNEDY ACT***

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SUMMARY OF REVISIONS:



**GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE**
Washington, D.C. 20230

DEC 15 1968

MEMORANDUM FOR:

Margaret H. Frailey
Assistant General Counsel
for Fisheries

FROM:

Marilyn G. Wagner
Assistant General Counsel
for Administration

SUBJECT:

Funding the Grant and National Fisheries
Research and Development Program Under the
Saltonstall-Kennedy Act

My staff has reviewed the attached memorandum prepared by your office regarding the use of Saltonstall-Kennedy (S-K) Act funds to pay the administrative costs of the S-K program and to implement the National Fisheries Research and Development Program provided for at 15 U.S.C. § 713c-3(d). The changes and additions we suggested relating to the proportion of S-K funds which may be spent on the National Program and the lack of any requirement to follow reprogramming procedures have been incorporated. Therefore, I concur with the conclusions reached in the memorandum.

My office is available for further consultation on this matter if necessary.

Attachment



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL
December 8, 1988

MEMORANDUM FOR: F - James W. Brennan
Assistant Administrator for Fisheries

FROM: GCF - Phyllis W. Jackson *WJ*
Attorney-Advisor

THROUGH: GCF - Margaret H. Frailey *mhf*
Assistant General Counsel for Fisheries

SUBJECT: Funding the Grant and National Fisheries
Research and Development Program Under the
Saltonstall-Kennedy Act

I. INTRODUCTION

A. Questions Presented

This memorandum is in response to the questions presented in your memoranda dated September 8, 1988 and October 25, 1988, regarding funding the Grant Program for Fisheries Research and Development ("Grant Program") and the National Fisheries Research and Development Program ("National Program") under the Saltonstall-Kennedy Act ("S-K"). The questions on which you requested a legal opinion are as follows:

- (1) Whether NMFS can charge its costs in administering the S-K Grant Program to the S-K Fund?
- (2) Is NOAA required to implement the National Program of research and development through grants, cooperative agreements, or contracts?
- (3) If NOAA is not required to implement the National Program through grants, cooperative agreements or contracts, would NOAA have the discretion to use the funds (S-K funds appropriated for the Grant Program) in-house, including NOAA salaries, to accomplish work in conformance with the goals and priorities established for the National Program?

B. Brief Answers

- (1) NMFS cannot charge its costs in administering the S-K Grant Program to the S-K Fund because payment of such costs from the Operations, Research, and Facilities ("ORF") account in past years is considered an election of appropriations that cannot be changed without changes in the



appropriation statute or as otherwise authorized.

- (2) & (3) NOAA is not required to implement the National Program through grants, cooperative agreements, or contracts. NOAA has the discretion to use the S-K funds appropriated for the Grant Program in-house to accomplish work in conformance with the goals and priorities established for the National Program. Such in-house use may include NOAA salaries. The use of S-K fund moneys to implement the National Program would amount to an election of appropriations. Implementation of the National Program does not require compliance with the notice provisions of the FY 1989 Appropriation Act.

II. BACKGROUND

A. General Authority

The S-K fund is capitalized by annual transfers from the Secretary of Agriculture to the Secretary of Commerce in amounts equal to 30 percent of the gross receipts collected under the customs laws on imports of fish and fish products. Whereas the total S-K annual transfer has been between approximately \$30M and \$50M over the last several years, Congress has consistently reduced this amount by large offsets ranging from \$20M to \$45M, which are transferred from the total S-K fund to the Operations, Research, and Facilities ("ORF") account of NOAA (see attachment). Once transferred to the ORF account, these funds lose their S-K character and may be used for any line item project, which need not relate to S-K. The amount that remains after the ORF offset is the available S-K fund.

The Saltonstall-Kennedy Act, as amended by the American Fisheries Promotion Act (15 U.S.C. 713c-3), provides that the S-K fund will be used (1) to provide grants for fisheries research and development projects (see 15 U.S.C. 713c-3(c)) and (2) to implement a national fisheries research and development program (see 15 U.S.C. 713c-3(d)). The S-K statute provides for the allocation of S-K fund monies in a 60:40 Grant Program to National Program ratio.

B. Highlights of Appropriations History

The available S-K fund and how it has been appropriated has changed significantly since enactment of the American Fisheries Promotion Act of 1980. For fiscal years 1981 and 1982, Congress, having transferred monies from the total S-K annual transfer to offset the ORF account, further provided that remaining S-K funds be made available for both

fisheries research and development grants and for the national fisheries research and development program.

However, since FY 1983, Congress has not made an appropriation to both programs from the remaining S-K funds; the legislative history has been silent regarding Congressional intent. Several program activities have been funded from the ORF account as fisheries development line items, leaving an S-K program of fisheries research and development grants only.

The FY 1985 budget process offers one of the more extensive histories on the subject of projects to be funded from S-K funds. For that fiscal year, in addition to \$10M for the Grant Program, Congress very selectively earmarked the transfer of \$10M for research and development projects to the ORF account. H.R. Rep. No. 952, 98th Cong., 2d Sess. 14, 15 (1984). However, there is no language which would suggest Congressional intent regarding which account should be charged the costs of administering the S-K Grant Program. Likewise, there is no illuminating discussion regarding Congress' intended source of funding for the National Program.

C. Current Appropriations Considerations

The legislative history of the current Appropriations Act is silent as to Congressional intent for funding the National Program as well as to the source for funding costs of administering the S-K Grants Program.

For FY 1989, there is very little explanatory language concerning the S-K Fund and related programs in the Appropriations Reports. The Conference Committee states: "The Conference Agreement provides \$7.7M for Saltonstall-Kennedy grants to conduct educational, technological and biological related research and marketing pertaining to American fisheries." H.R. Rep. No. 979, 100th Cong., 2d Sess. 16 (1988).

There is also a statement in the House Report that the Committee reserves amounts at the fiscal year 1988 enacted (freeze) level for transfers from the "Promote and Develop Fisheries Products and Research Pertaining to American Fisheries Fund." H.R. Rep. No. 688, 100th Cong., 2d Sess. 13, 14 (1988). In similarly cursory fashion, the Senate Report language simply identifies the \$45.6M offset from the S-K Fund. S. Rep. No. 738, 100th Cong., 2d Sess. 24 (1988).

III. DISCUSSION

A. Findings Regarding Costs of Administering the S-K Grant Program

Where there are two appropriations available for the same purpose the determination of the agency as to which of the two appropriations to use will not be questioned. However, once the election has been made, the continued use of the appropriation selected to the exclusion of any other for the same purpose is required, in the absence of changes in the appropriation acts. 15 Comp. Dec. 101 (1908); 5 Comp. Gen. 479 (1926); 10 Comp. Gen. 440 (1931); 23 Comp. Gen. 827 (1944). GAO Principles of Federal Appropriations Law, 2-33 (1982).

Over the last several years, Congress has appropriated funds specifically for the S-K Grant Program and for NOAA's general ORF account from monies from the S-K transfer fund (see attachment). In neither case did Congress specify a source for funding the costs of administering the S-K Grant Program. NOAA chose to fund these costs from the ORF account and has continued to do so. NOAA's actions amount to an election of appropriations. Once an initial election is made, the agency cannot thereafter change its election and use the other source of appropriated funds. *Id.* at p. 2-33. Therefore, NMFS cannot charge its costs in administering the S-K Grant Program to the S-K fund without changes in the appropriations statute or as otherwise authorized. There is no legislative history that suggests a different Congressional intent.

B. Findings Regarding Requirements to Implement the National Program Through Grants, Cooperative Agreements, Contracts, etc.

Each agency's program authority must be analyzed to identify the type or types of relationships authorized, and the circumstances under which each authorized relationship can be entered. GAO Principles of Federal Appropriations Law 13-5 (1982). Therefore, NMFS may use its discretion within the limits of the authorizing and appropriation statutes in selecting the relationship(s) for implementing the National Program.

The language of the S-K Act at 15 U.S.C. 713c-3(d) which authorizes the National Program states:

(d) National fisheries research and development program

(1) The Secretary shall carry out a national program of research and development addressed to such aspects of United States fisheries (including, but not limited to, harvesting, processing, marketing, and associated infrastructures), if not adequately covered by projects assisted under subsection (c) of this section, as the Secretary deems appropriate.

There are no limits imposed by the authorizing statute (S-K) that would require the use of grants, cooperative agreements, or contracts to implement the National Program. The Secretary is given broad authority to carry out the National Program as he deems appropriate. The legislative history of the authorizing legislation rarely mentions the National Program, and where it does, there is no language that would suggest an intent to require the use of grants, cooperative agreements, or contracts.

The rule regarding restrictions on the use of a lump sum appropriation is discussed in 55 Comp. Gen. 307 as follows:

"When Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements of Federal agencies."

The relevant language in the current Appropriations Act states: "...and in addition, \$45,600,000 shall be derived by transfer from the Fund..." This language provides for the transfer of monies from the total S-K fund to the ORF account, thereby leaving \$8M in the available S-K fund. This is an appropriation without statutory restriction.

The language in the Conference Report for the current Appropriation Act states: "The Conference Agreement provides \$7.7M for Saltonstall-Kennedy grants to conduct educational, technological and biological related research and marketing pertaining to American fisheries." H.R. Rep. No. 979, 100th Cong., 2d Sess. 16 (1988).

While stating that the appropriations are for S-K grants, this language is arguably not intended to limit the historical implementation of the Grant Program to exclude cooperative agreements or any other relationship. Therefore, in implementing the National Program, NOAA may use any appropriate type of relationship.

C. Findings Regarding NOAA's Proposal to Use S-K Funds
In-house for National Program Purposes

As distinguished from the previous discussion in Section B regarding the allowable types of relationships by which to implement the National Program, NOAA also seeks clarification as to the propriety of particular expenditures. NOAA proposes to use S-K funds in-house, including NOAA salaries, to accomplish work in conformance with the goals and priorities established for the National Program. The fundamental statute governing the use of appropriated funds found at 31 U.S.C. §628 states:

Except as otherwise provided by law, sums appropriated for the various branches for expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

The rule is that existing agency appropriations which generally cover the type of expenditures involved are available to defray the expenses of new or additional duties imposed by proper legal authority. GAO Principles of Federal Appropriations Law, 3-8 (1982). But, where an appropriation specifies the purpose for which the funds are to be used, the appropriation is simultaneously a grant of authority and a limitation. *Id.* at p. 3-9.

The in-house expenditures, including salaries, proposed in carrying out the National Program would be the result of additional duties imposed by proper legal authority and existing appropriations should be available to defray them. However, the existing appropriations must generally cover the type of expenditures involved. The test for availability is whether the duties imposed by the new law bear a sufficient relationship to the purposes for which the previously-enacted appropriation was made so as to justify the use of that appropriation for the new duties. GAO Principles of Federal Appropriations Law, 3-8 (1982). The relationship of the National Program to the existing Grant Program, the history of the authorization and appropriations legislation, as well as the current appropriations measures support the conclusion that existing appropriations generally cover expenditures such as those proposed for use in-house, including salaries.

Again, it is necessary to consider the language in the Conference Report which provides that S-K funds be used for "grants to conduct educational, technological and biological related research and marketing pertaining to American fisheries." This could arguably be considered a limitation on the proposed expenditure, but not when considered in conjunction with the rule discussed in 55 Comp. Gen. 307 (infra page 5) which provides that committee reports and other legislative history do not establish any legal requirements on Federal agencies when Congress

appropriates lump sum amounts without statutorily restricting what can be done with those funds.

In addition, the Secretary is authorized to implement the National Program only upon a finding that certain aspects of the United States fisheries are not adequately covered by the Grant Program (see 15 U.S.C. 713c-3(d)(1)). The S-K Act also provides that at least 60 percent of the available S-K funds must be allocated to grants and the balance of the funds are to be used for the National Program (see 15 U.S.C. 713c-3(e)). This statutory provision for allocation and the interdependent relationship of the National Program to the Grant Program strongly (1) suggest an intent to have both programs funded from the same fund (otherwise, it seems impracticable to calculate the 60:40 required allocation), and (2) provide evidence of sufficient relationship between the purposes of these programs to satisfy the test for availability. Therefore, implicit in the authorization of the National Program is a strong argument that existing agency S-K Grant Program appropriations are available to cover proposed in-house expenditures including salaries for a National Program, and that the current appropriation is not a limitation on the proposed expenditures. (The use of S-K Grant Program appropriations to implement the National Program would amount to an election of appropriations.)

Whereas the Secretary is authorized to implement the National Program, there must be a finding that supports his decision and funding for the National Program must be limited to 40 percent of the available S-K fund appropriated for the Grant Program pursuant to recent appropriations measures. In the event that the National Program is implemented, the amount of funds available for the Grant Program must be reduced by the amount used for the National Program. However, in accordance with statutory requirements, the amount to be used for the Grant Program must not be less than 60 percent of the available S-K funds.

D. Requirements for Notification to Congress

The requirement for notification to Congress pursuant to the current Appropriation Act applies in the case of reprogrammings that meet any one of five criteria. Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriation Bill for 1989, October 1, 1988, Pub.L. 100-459, Stat. (1988). The proposed implementation of the National Program through the use of available S-K funds is not a reprogramming, but it is a transfer. A transfer is prohibited without statutory authority. GAO Principles of Federal Appropriations Law, 2-28. The proposed use of available S-K funds for the National Program is a transfer that is authorized pursuant to section 713c-3(e)(1)(B) of the S-K Act. This section provides:

(e) Allocation of fund moneys

(1) Notwithstanding any other provision of law, all moneys in the fund shall be used exclusively for the purpose of promoting United States fisheries in accordance with the provisions of this section, and no such moneys shall be transferred from the fund for any other purpose. With respect to any fiscal year, all moneys in the fund, including the sum of all unexpended moneys carried over into the fiscal year and all moneys transferred to the fund under subsection (b) of this section or any other provision of law with respect to that fiscal year, shall be allocated as follows:

(A) the Secretary shall use no less than 60 per centum of such moneys to make direct industry assistance grants to develop the United States fisheries and to expand domestic and foreign markets for United States fishery products pursuant to subsection (c) of this section; and

(B) the Secretary shall use the balance of the moneys in the fund to finance those activities of the National Marine Fisheries Service which are directly related to development of the United States fisheries pursuant to subsection (d) of this section.

Therefore, the proposed implementation of the National Program through the use of available S-K funds does not require notification to Congress pursuant to the current Appropriation Act. (However, note that the Secretary is required to prepare and submit a report to Congress in accordance with 15 U.S.C. 713c-3(d)(2) no later than 60 days before the close of each fiscal year.)

Attachment

Saltonstall-Kennedy Funds
1981 - 1989
(\$ in millions)

<u>Fiscal Year</u>	<u>Total S-K Transfer</u> <u>1/</u>	<u>S-K Appropriations</u>	<u>ORF Offset</u> <u>2/</u>
1981	\$35.0	\$17.5 <u>3/</u>	\$17.5
1982	\$26.2	\$16.2 <u>4/</u>	\$10.0
1983	\$30.6	\$ 8.0 <u>5/</u>	\$22.6
1984	\$33.6	\$10.0	\$23.6
1985	\$34.9	\$ 9.0	\$25.9
1986	\$43.7	\$ 7.7 <u>6/</u>	\$34.1 <u>7/</u>
1987	\$57.4	\$ 7.4 <u>8/ 9/</u>	\$51.6
1988	\$56.3	\$11.9 <u>10/</u>	\$44.4
1989	\$53.6	\$ 8.0 <u>11</u>	\$45.6

1/ Transfer from the Department of Agriculture to the Department of Commerce (NOAA) of 30 percent of the gross receipts from duties collected on imports of fish and fish products.

2/ The amount transferred from the S-K fund and used to offset the appropriation requirements of the Operations, Research and Facilities (ORF) account. ORF is NOAA's major appropriation.

3/ \$9.4 million for fisheries research and development grants (Section (c) of S-K Act, as amended) and \$8.1 for National Fisheries Research and Development Program (Section (d), S-K Act, as amended).

4/ \$8.1 million for fisheries research and development grants and \$8.1 million for National Fisheries Research and Development Program.

5/ FY 1983 forward, the National Fisheries Research and Development Program (product, quality, and safety research and fisheries development research and services) was transferred to the fisheries development line item in the ORF appropriation, leaving an S-K program of fisheries research and development grants.

6/ Does not include \$0.3 million withheld for Gramm-Rudman-Hollings (G-R-H).

7/ Does not include \$1.6 million withheld for G-R-H.

8/ Includes \$1.6 million in G-R-H sequestered funds carried over from FY 1986.

9/ Includes \$750,000 which was placed in Fisheries Promotional Funds established by the Fish and Seafood Promotion Act of 1986 (FSPA).

10/ Includes \$2.6 million which was placed in Fisheries Promotional Fund.

11/ Includes \$2.6 million which was placed in Fisheries Promotional Fund.